United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1228

No. 74-1228

In the United States Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA, APPELLEE

v.

BENJAMIN SCHWARTZBERG, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.
RICHARD L. SHANLEY,
Special Attorney,
Department of Justice,
Brooklyn, New York.
ROBERT L. KEUCH,
TERENCE M. BROWN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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ISSUES PRESENTED

1. Whether, on the facts as established by the evidence, the defendant was properly convicted of a Hobbs Act violation?

2. Whether the alleged instances of prosecutorial misconduct deprived the defendant of a fair trial?

STATUTES INVOLVED

18 U.S.C. 1951 provides in pertinent part:

§ 1951. INTERFERENCE WITH COMMERCE BY THREATS OR VIOLENCE

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so

to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

* * * * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT

1. Following a jury trial in the U.S. District court for the Eastern District of New York (Weinstein, J.), the defendant, Benjamin Schwartzberg, was convicted of interfering with interstate commerce by threats or violence, in violation of 18 U.S.C. § 1951 (Hobbs Act). On January 18, 1974, he was sentenced to ten years imprisonment, all but six months of which was suspended, and a $10,000 fine.

2. The evidence at trial revealed that in early 1970, Philip Reicher and four others formed the 21–44 Food Corporation (also referred to as the Bagel Stop) in order to enter the wholesale/retail bagel business in New York (T. 187–188). The defendant, as the proprietor of the Star of David Bagel Corporation and Queens Bialys, was one of their larger competitors in the area (T. 196, 465–466). From January until July 1970, the Bagel Stop was a growing, if struggling, business (T. 249–250, 471). By July, 1970,

it was using approximately 10,000 pounds of flour per week, at least part of which was delivered to the bakery from New Jersey (T. 102, 189–192, 451).

In June 1970, Reicher successfully negotiated with Waldbaums, a department store chain, for the right to supply bagels and bialys to a number of its outlets in Queens and Nassau. Five of these accounts were then being handled by the defendant. The Bagel Stop began servicing these accounts on July 5, 1970 (T. 198–200, 361–363). Beginning early in July and continuing intermittently until August, there occurred a series of acts of vandalism directed at the Bagel Stop and committed at night, including frequent puncturing of employees' tires and the repeated breaking of windows at the Bagel Stop (T. 225–227, 456–457, 460). On July 8 and 10, the defendant was seen in the area of the Bagel Stop at about 1:00 in the morning by one of the Bagel Stop's employees. The defendant was purportedly there at that hour on behalf of a local union in his capacity as its representative (T. 393–398).

On July 10, 1970, the defendant came to the Bagel Stop to collect a bill which the Bagel Stop had previously paid with a check that had been returned for lack of funds. Reicher testified that the following occurred (T. 228):

> A. I told [the bookkeeper] to draw a check for Mr. Schwartzberg to pay him up to date, and she drew the check and she left.
>
> Q. Did the conversation continue?
>
> A. Yes.

Q. As best you can actually give us, what did you say and what did Mr. Schwartzberg say?

A. I had said to Mr. Schwartzberg that I was sorry I took the Waldbaum's [account] away from him, but business was business and Mr. Schwartzberg came back at me with "This is your last gasp, kid."

And I said to Mr. Schwartzberg, "Benny, please, business is business." And he left.

Q. What was your state of mind?

A. It wasn't good. I was very nervous.

Darryl Steinberg, a baker for the Bagel Stop, testified to a similar incident with the defendant's son, Ted Schwartzberg (T. 448–449):

A. Teddy had come into the bakery to collect a bill and after he come out of the office he come back in the production area where I was and started to talk to me and he said to me "My father wasn't born yesterday. He knows how to take care of people."

I said "What do you mean?"

He said "My father knows how to take care of people. We can undercut more than anyone else."

Q. How did you react to this?

A. I was scared and frightened.

In addition, there were a series of conversations between the owners and employees of the Bagel Stop and others in the industry as to the advisability of returning the Waldbaum accounts to the defendant. The dominant theme in these conversations was the defendant's reputation as a violent man and the possibility that he might retaliate violently for the loss of the Waldbaum accounts. Also mentioned was that the de-

fendant was known by the nicknames "Benny the bomber" and "The Torch" (T. 212–215, 222–225, 229–232, 413–418, 427–428). Most of those associated with the Bagel Stop were nervous and apprehensive and some favored returning the accounts (T. 444–447, 451–453).

On the night of July 16, 1970, Patricia Guze, a seventeen year old ex-employee of the Bagel Stop, became involved in an argument with her parents and as a result asked for and received permission to spend the night at the bakery (T. 68–72). She stated that at approximately 12:30 a.m., a gray Cadillac pulled up in front of the Bagel Stop and a man in a white bakers uniform got out (T. 73) and "walked up and down the block looking at the bakery from all different angles" before he reentered his car and left (T. 74). She testified that the street was very well lit (T. 72) and that she got a good look at him (T. 74). In the next few minutes the gray Cadillac repeatedly passed the bakery at a slow speed, always going in the same direction (T. 76–80). At this time Diana Regan, another seventeen year old employee of the Bagel Stop called. She lived just around the corner from the bakery and as the two girls were talking on the phone, she also saw the Cadillac as it circled the block several times (T. 80–81, 160–169). As Miss Regan was listening, she heard Miss Guze exclaim "He came back again" and then that "there's a fire under the truck" (T. 167, 169). Miss Guze testified (T. 85):

> A. Just then, I turned around and looked, and this same man was in the back of the truck, squatting down, and with his hands in the area

of the gas tank. I couldn't tell exactly what he was doing, but his hands were doing something. And I said, "That is—" I hung up the telephone and I called the police.

Q. What did you watch——

A. No, I just then I had, when he was leaving, he dashed to his car and there was flames shooting out of the back of the truck.

Q. What car did he get into?

A. He got back in the Cadillac and drove away real fast.

Q. What did this man have on at that time?

A. White baker's uniform.

Q. Was this man you had seen previously?

A. Yes.

Miss Guze then called the police, who arrived shortly and put out the fire, which was the result of papers having been stuffed into the gas tank and ignited (T. 86–87, 382–387).[1] She testified that after the police had extinguished the fire and she had told them what happened, she saw the Cadillac again approaching the Bagel Stop. The Cadillac was "going north on Utopia at a very slow speed, and then he turned very quickly and made a right on twenty-second Avenue and went away, real, real fast, and then I told the police that that was the man I saw, and they brought him back"

[1] Miss Guze' recollection of the events differed slightly from that of officer Ward, who responded to the radio run. She testified that the police arrived and banged on the window of the store to get her attention. When she approached the front window and saw that there were still flames coming from the truck, she pointed this out to the police, who then put out the flames (T. 86–87). According to officer Ward, he arrived, put out the fire, and then talked to Miss Guze (T. 115–116).

(T. 87).[2] The man the police brought back was the defendant, who Miss Guze positively identified as the one who had set fire to the truck (T. 88). When asked why she was so sure she testified (T. 88–89):

> Well, I'm positive, because I know what I saw, and what I saw is the same thing I see now, the same face, the same coloring, the same everything. I was just so scared that I got a good look at him. It's something that you remember.

Following this, events moved quickly. The bakery was forced to make its deliveries in private cars or in a rented truck (T. 234, 236, 401–402, 463). There were more discussions concerning the defendant and the recent happenings and it was decided that the Bagel Stop would stop soliciting the accounts handled by the defendant (T. 236–237, 322–323, 464–467). On July 28, 1970, the Bagel Stop ceased to exist. As Darryl Steinberg testified (T. 467):

> Eventually we decided that it was not worth it. We were all too afraid. We didn't want anything else to happen to anybody and we said—I said "Forget about it, Phil [Reicher]. It is not worth it. Nothing is worth somebody dying over" and he agreed and we closed the business up.

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[2] Again Officer Ward's recollection differed somewhat. According to him he had finished questioning Miss Guze, got into his car, and radioed the station house that he was resuming patrol before he saw the gray Cadillac make a right turn off of Utopia Parkway onto 22nd Ave. Both agreed that he then went after the automobile and returned shortly with the defendant (T. 118–119).

By late July, the defendant was once again handling the five Waldbaum accounts which the Bagel Stop had started servicing on July 5th (T. 364, 368–369).

3. Although the defendant did not testify, he called three witnesses who testified generally that they believed the Bagel Stop was not a financially sound organization (T. 494, 552–553, 569). They also testified that they had not heard the defendant referred to as vicious or by the nicknames testified to by the government witnesses (T. 492, 548, 568–569). However, on cross examination one of the three admitted that he had testified before the grand jury that he was aware of the defendant's "bad reputation" in the industry and that "this was his method of operation" (T. 538, 542) and that he also had heard the defendant referred to as "Benny the Bomber" or "The Torch" (T. 537–543).

The defendant also called his son, who testified that he had asked the defendant to deliver some pastries to several accounts which were in the area of the Bagel Stop on the night in question (T. 582–583).

ARGUMENT

I. The defendant was properly convicted of a Hobbs Act violation

A. The evidence was sufficient to support a conviction under the Hobbs Act

In order to establish a violation of the Hobbs Act, 18 U.S.C. 1951, it is necessary for the government to show: (1) that the defendant induced the victim to part with property; (2) that the victim did so as a result of the wrongful use of actual or threatened force, violence or fear; and (3) that in so doing inter-

state commerce was adversely affected. See, *e.g.*, *United States* v. *Nakaladski*, 481 F. 2d 289, 298 (5th Cir., 1973), certiorari denied, 414 U.S. 1064.

The evidence was sufficient to support the finding on each of these elements and was clearly sufficient when viewed, as it must be, in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). It revealed that the defendant was aware that the Bagel Stop was taking accounts away from him and that he was upset over this (T. 362); that he had made at least one statement to one of the owners of the Bagel Stop which could reasonably be understood as a threat (T. 227–228);[3] that he had attempted to destroy their delivery van (T. 84–87); and that as a result the Bagel Stop went out of business and the defendant regained the Waldbaum accounts (T. 364, 368–369, 467).[4] Finally, interstate commerce was certainly sufficiently obstructed, delayed or affected[5] (T. 189–192, 451).

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[3] Defendant argues that his statement "This is your last gasp, kid" was not a threat but rather a reflection of his awareness that the Bagel Stop was in financial difficulities. Although the jury, as the finder of fact, could have accepted this rather strained interpretation, it was clearly not required to do so. Rather, it is submitted, the jury could and did more logically conclude that in the context in which this occurred, the defendant was indeed threatening Mr. Reicher. See *United States* v. *Tolub*, 309 F. 2d 286 (2nd Cir., 1962); *NLRB* v. *Local 254*, 359 F. 2d 289 (1st Cir., 1966).

[4] It is clear that the right to solicit accounts as well as the accounts themselves are "property" subject to Hobbs Act protection. *United States* v. *Tropiano*, 418 F. 2d 1069, 1075 (2nd Cir., 1969), certiorari denied, 397 U.S. 1021; *United States* v. *Nadaline*, 471 F. 2d 340 (5th Cir., 1973), certiorari denied, 411 U.S. 951.

[5] See pp. 10–11, *infra*, and footnote 6.

Defendant, however, argues that the evidence was insufficient because it failed to show that he intended to take any property from the Bagel Stop. The short answer to this is that intent can be inferred from one's actions and, in the instant case, there was an abundance of evidence from which such an intent could be inferred. See *United States* v. *Sullivan,* 406 F. 2d 180, 186 (2nd Cir., 1969). Indeed, there would seem to be no other logically satisfying explanation for his attempt to destroy the delivery truck, other than a desire to regain the accounts in question (as well as other accounts) by either destroying his competitor or intimidating him into foregoing competition in the disputed field. See *United States* v. *Mitchell,* 463 F. 2d 187, 192 (8th Cir., 1972), certiorari denied, 410 U.S. 969; *United States* v. *Green,* 246 F. 2d 155, 159–160 (7th Cir., 1957), certiorari denied, 355 U.S. 871; *United States* v. *Tolub,* 309 F. 2d 286, 289 (2nd Cir., 1962).

B. The defendant's acts were properly charged under the Hobbs Act

In *Stirone* v. *United States,* 361 U.S. 214, 215 (1960), the Supreme Court interpreted the protection bestowed by the Hobbs Act. The Court there stated that the statute "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference 'in *any* way or degree.' " *Stirone,* id. (emphasis added). In the instant case it is beyond dispute that defendant's behavior affected interstate commerce. As a result of

his activities, a bakery which was using some 10,000 pounds of flour per week decided to go out of business. Although the testimony was not clear as to how much of that flour came from another state, it was undisputed that at least a portion came from New Jersey (T. 189–192, 451). See *United States* v. *Augello,* 451 F. 2d 1167, 1169 (2nd Cir., 1971), certiorari denied 405 U.S. 1070; *United States* v. *DeMasi,* 445 F. 2d 251, 257 (2nd Cir., 1971), certiorari denied 404 U.S. 882; *United States* v. *Tropiano,*[6] 418 F. 2d 1069, 1076 (2nd Cir., 1969), certiorari denied 397 U.S. 1021.

Defendant, however, relying upon *Rewis* v. *United States,* 401 U.S. 808, 812 (1971) and *United States* v. *Archer,* 486 F. 2d 670, 678 (2nd Cir., 1973), claims that, if the Hobbs Act is allowed to cover the instant crime, this case will expand Federal jurisdiction into an area "which traditionally has been subject to state regulation" (Def. br. 18). The short answer to this is that both *Rewis* and *Archer* dealt with the Travel Act (18 U.S.C. 1952), whose language is much less inclusive than that involved here. *United States* v. *De Met,* 486 F. 2d 816, 821 and Ftnt. No. 5 (7th Cir., 1973), certiorari denied April 29, 1974, petition No. 73–989. The Travel Act prohibits a relatively narrow spectrum of activities—the traveling in interstate or

[6] In *Tropiano, supra,* 418 F. 2d at 1076, this Court held that: "The phraseology of the Act makes it clear that the interference or attempted interference with interstate commerce 'in any way or degree' is prohibited. Stated differently, extortion or threats of violence need affect interstate commerce only in a minimal degree to constitute a violation. The broad and extensive reach of the commerce clause under the Hobbs Act has been upheld in a variety of circumstances." (citations omitted).

foreign commerce, or the use of any facility in interstate or foreign commerce, with the intent to do various acts such as to commit a crime of violence (18 U.S.C. 1952). On the other hand, the Hobbs Act "contemplates a full application of the commerce power. It proscribes extortion which 'in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce * * *' " *DeMet id.* at 821. In short, Congress, itself has determined that *any* effect upon interstate commerce in any degree caused by the means specified, including the wrongful use of force, violence or fear is of federal concern and should be prohibited and, in the clear language of the statute, has said so. Since the decisions of the Supreme Court in *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1936), and *National Labor Relations Board* v. *Fainblatt,* 306 U.S. 601 (1939), there can be no question of the power of Congress to make that determination. Moreover, in view of the decision of the Supreme Court in *Stirone, supra,* and in the face of the statute's language, there can be no question of the intent of Congress to include the type of acts with which defendant was charged and of which he was convicted.[7]

[7] While, viewed in isolation, defendant's violent act against the Bagel Stop undoubtedly may have had a limited impact on the flow of interstate commerce, the Supreme Court has recognized that whether or not a practice may be deemed to effect commerce "is not to be determined by confining judgment to the quantitative affect of the activities immediately" at hand and that it is appropriate to consider whether "the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become

These same considerations answer defendant's argument that, since the Hobbs Act "was conceived to deter labor racketeering and professional gangsterism", it cannot be used here, where "there was no claim * * * that the defendant was ever involved in organized crime * * *" (Def. br. 18). While it may be that the primary concern of the statute was and is labor racketeering and other forms of organized criminal behavior, the statute by its terms is not so limited. It is applicable to whomever engages in the proscribed conduct whether or not they are alleged to have underworld connections. Cf. *Carbo* v. *United States,* 314 F. 2d 718, 732 (9th Cir., 1963), certiorari denied 377 U.S. 953.

Finally, defendant's argument that his "petty act of vengeance" was "essentially local" and thus "should have been" tried in the state courts is not only of questionable accuracy,[8] but it ignores the so called "separate sovereigns" doctrine. That is, his claim that he should be tried by state authorities rather than federal, implies that the two remedies are mutually exclusive. This is, of course, incorrect. Where the same act constitutes both a federal as well as a state crime,

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far reaching in its harm to commerce." *Polish Alliance* v. *National Labor Relations Board,* 322 U.S. 643, 648 (1944). Similarly, it is apparent that the use of illegal "business methods" which defendant was here shown to have employed, if left unchecked, could have a significant impact on interstate commerce.

[8] See Footnote, #7, supra. The "Petty" and "local" act to which defendant refers, was the attempted explosive destruction on a public street of a commercial vehicle owned and operated by a business firm dealing in interstate commerce.

the offender may be prosecuted by either or both jurisdictions. *Bartkus* v. *Illinois,* 359 U.S. 121 (1959); *Abbate* v. *United States,* 359 U.S. 187 (1959).

II. The alleged instances of prosecutorial misconduct do not warrant reversal

The defendant cites a number of alleged instances of prosecutorial misconduct which he contends deprived him of a fair trial. This claim is not well taken. When the incidents referred to are examined in context, it is apparent that most of them clearly do not involve improper acts on the part of the prosecutor. Moreover, those few instances which arguably were improper, were in fact innocuous events of such limited impact, when considered in the context of the whole trial and the convincing evidence of guilt, that they clearly do not require reversal.

A. The Government's summation was permissible advocacy

1. The bulk of the alleged instances of prosecutorial misconduct occurred during final argument. Petitioner's first contention in this area is that the prosecutor improperly argued that the defendant was responsible for acts of vandalism which had been plaguing the Bagel Stop.[9] The statements to which defendant ob-

[9] Defendant, in passing, claims that the evidence as to the acts of vandalism which occurred after July 17 (the date of his arrest) should not have been admitted. Apparently this claim refers to this colloquy (T. 460):

"Q. How many flats did you get?

"A. Fifteen or fourteen flats.

"Q. During what period of time were you getting these flat tires?

"A. July to mid-August."

Firstly, it appears that the crucial date would be July 28, when

jects occurred in the beginning of the following colloquy (T. 637):

> Defendant would have you believe and would attempt to obfuscate the fact that he threatened Phil Reicher. His son threatened Darryl. *He punched holes in Darryl's car. He broke windows* and eventually he put the torch to the truck, 21–44 Food Corporation. (emphasis added).
>
> Mr. KESTNEBAUM. Your Honor, I object to these statements about holes in the car or breaking windows. There has not been the slightest evidence of any of that in the case.
>
> The COURT. Well, ladies and gentlemen, the attorney is asking you to draw inferences from the evidence. I believe, in view of the inferences that defense counsel requested the jury to draw, I believe that counsel for the Government is properly arguing in asking that contrary inferences be drawn.

The prosecutor did not again allude to the possibility that the defendant had been the perpetrator of these acts.[10]

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the business closed and until which the state of mind of the victim was relevant, see eg. *United States* v. *Tolub*, 309 F. 2d 286, 289 (2nd Cir., 1962). Moreover, the impact of the above testimony, which was not objected to at trial on the ground here advanced, would clearly not have been changed in any substantial manner had it been restricted to events in July. Thus, even assuming defendant had objected, the error, if any, would be harmless.

[10] Defendant's claim that the prosecutor repeated these statements is incorrect (Def. br 12). The broken windows and punctured tires were mentioned in passing twice more, but each time it was in reference to the frame of mind of the victims and there was no claim that the defendant was the perpetrator (T. 656–657, 659).

In order to properly evaluate the prosecutor's statement and the court's response, it is necessary to consider the context in which they occurred. The defendant, in his summation, had asked the jury to conclude that he was being framed. That is, he argued that Miss Guze and Reicher were engaging in adulterous behavior at the Bagel Stop on the night in question. He hypothesized that they could not meet at Reicher's apartment because he might have another woman living there (T. 605–608). Upon seeing the defendant pass by, they decided to destroy the truck for the insurance proceeds and to blame it on their competitor, the defendant (T. 608–611, 622–623). Evidence in the record to support these inferences was largely nonexistent. Then, in an apparent attempt to persuade the jury that those associated with the Bagel Stop were not frightened and that they would not have believed the defendant was connected with the acts of vandalism, counsel for defendant stated (T. 624–625):

> You heard Mr. Levy say that there were broken windows all over the neighborhood. Well, you know that all over New York it's terrible. You may remember up at 46th Street and Fifth Avenue, I think it was half a block front, the Wallach Stores, all vandalism, broken windows. Walk into any elevator building, vandalism. Walk into any subway car and it's getting to be loathsome. It's all over New York.

It was apparently in response to this argument that the prosecutor stated "Defendant would * * * attempt

to obfuscate the fact that he threatened Phil Reicher. * * * He punched holes in Darryl's car. He broke windows and eventually he put the torch to the truck" (T. 637).

Part of the prosecutor's function is to make a forceful and vigorous argument, *United States* v. *Brown,* 456 F. 2d 293, 295 (2nd Cir., 1972), certiorari denied 407 U.S. 910, and within broad limits he may argue inferences which he wishes the jury to draw from the evidence, *United States* v. *Dibrizzi,* 393 F. 2d 642, 645 (2nd Cir., 1968). Moreover, appellate courts properly allow more latitude for argument which is in response to defense counsel statements, e.g. *United States* v. *Benter,* 457 F. 2d 1174, 1176 (2nd Cir., 1972), certiorari denied 409 U.S. 842.

Defendant, however, points out that the evidence concerning vandalism and the defendant's reputation was admitted only for the impact it would have had on the victims. While this is true, and the jury was so instructed (T. 221–222, 226, 414, 428, 460–461), defendant overlooks the fact that, in order for the acts to have affected the state of mind of the victims in a manner pertinent to this case, the victims must have believed that the defendant was responsible. Thus, the prosecutor could properly argue that the victims believed that the defendant was responsible for the acts of vandalism. This, we submit, is what the prosecutor, albeit inarticulately, was asking the jury to infer and is what the jury, in view of the repeated instructions (T. 221–222, 226, 414, 428, 460–461), would have understood him to mean.

In any event, this passing remark in the course of a lengthy and temperate final argument, following a case where the evidence of defendant's guilt was overwhelming, was not reversible error. See *United States* v. *Projansky*, 465 F. 2d 123, 138 (2nd Cir., 1972), certiorari denied 409 U.S. 1006; *United States* v. *Tortoro*, 464 F. 2d 1202, 1207 (2nd Cir., 1972), certiorari denied 409 U.S. 1063; *United States* v. *Mattio*, 388 F. 2d 368, 371 (2nd Cir., 1968), certiorari denied 390 U.S. 1043. That is, in the instant case, where the defendant asked the jury to infer that vandalism was so prevalent in New York that presumably the victims here would not associate the incidents with him, the prosecutor's remark, while possibly ill-advised, was not of a sufficiently prejudicial character to require reversal.

2. Defendant also contends that the following portion of the final argument was improper (T. 654):

> Very strange, ladies and gentlemen, for a competitor to be lurking around somebody's store trying to get a driver to join the union. What would that mean? If they got this driver into the union, perhaps a strike? Perhaps labor problems? Perhaps some sort of disruption in this little company that was fighting for its life and to grow and get bigger and bigger.

The defendant's position is that this was "asking the jury to draw inferences of threats from lawful and unthreatening conversations" (Def. br. 13). This claim is insubstantial. A review of the testimony in question (T. 392–398) reveals that the comments were

appropriate. As this Court stated in *Dibrizzi* supra 393 F. 2d at 646:

> What appellant characterizes as misstatements of fact are really inferences drawn by the prosecutor from the evidence adduced at trial, albeit inferences differing from those which defense counsel would have drawn from the same evidence. Within broad limits, counsel for both sides are entitled to argue the inferences which they wish the jury to draw from the evidence. *United States* v. *De Fillo,* 257 F. 2d 835, 840 (2nd Cir., 1958), certiorari denied, 359 U.S. 915, 79 S. Ct. 591, 3 L.Ed. 2nd 577 (1959); *United States* v. *Nunan,* 236 F. 2d 576, 588–589 (2nd Cir., 1956), certiorari denied, 353 U.S. 912, 77 S.Ct. 661, 1 L.Ed 2nd 665 (1957).

3. Similarly, defendant contends that two statements by the prosecutor were not supported by the record (Def. br. 12). The first of these was that Standard Milling was still doing business with Phillip Reicher (T. 634). Contrary to defendant's claim, there is support for this statement in the record. Although the company's vice-president testified that he did not know for certain whether Standard Milling was presently dealing with Reicher (T. 573–574), the inference was not improper where he also testified that they service 90% of the bagel bakeries in the area (T. 568) and the evidence was uncontradicted that Reicher was then operating a bakery (T. 186).

However, there does not appear to be substantial support in the record for the statement that the delivery truck had number 21 on its side and that "they had hoped to maybe have 21 trucks like this some

day * * *" (T. 657; Def. br. 12).[11] Although the statement appears to be based on information not reflected in the record, we submit that it is harmless error. That is, it was a passing remark which was not addressed to the issue of the defendant's guilt or innocence and which certainly would not have affected the jury's verdict. In this situation, where the defendant fails to object to the alleged error in final argument (or ask for curative instructions), this Court, in *United States* v. *Briggs*, 457 F. 2d 908, 912 (2nd Cir., 1972), certiorari denied 409 U.S. 986, has held that:

> * * * an appellate court will reverse only if the summation was so "extremely inflammatory and prejudicial," *United States* v. *DeAlesandro*, 361 F. 2d 694, 697 (2nd Cir.) certiorari denied, 385 U.S. 842, 87 S. Ct. 94, 17 L. Ed. 2d 74 (1966), that allowing the verdict to stand would "seriously affect the fairness, integrity or public reputation of judicial proceedings," *United States* v. *Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555 (1936). See also *New York Central R.R.* v. *Johnson*, 279 U.S. 310, 318–319, 49 S. Ct. 300, 73 L. Ed. 706 (1929); *San Antonio* v. *Timko*, 368 F. 2d 983, 986 (2nd Cir., 1966).

This summation clearly did not fall below that standard.

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[11] The following was the only testimony relating to this statement which we could find (T. 392):

"Q. Was there any writing on the van?

"A. It was, the truck was white and it had, I guess, 'Bagel Stop,' in big letters on the side and the telephone number of the place and a vehicle number, on the side."

4. The defendant also contends that the prosecutor improperly commented on his failure to call Martin Schwartzberg.[12] This claim is frivolous.

The rule is well settled that the prosecutor may comment on the defendant's failure to call a witness e.g. *United States* v. *Lipton*, 467 F. 2d 1161, 1168 (2nd Cir., 1972), certiorari denied 410 U.S. 927. In addition, this Court has held that the failure to produce a witness equally available to both sides allows an adverse inference to be drawn against either side. *United States* v. *Dibrizzi*, 393 F. 2d 642, 645 and cases there cited (2nd Cir., 1968). Defendant's reliance on *United States* v. *La Rocca*, 224 F. 2d 859, 861 (2nd Cir., 1955), is misplaced. That case stands for the proposition that it is not error for a trial court to refuse to instruct that the failure of the government to call a witness (who was equally available to both parties) justified the inference that, had he testified, his testimony would have been unfavorable to the prosecution. That holding is not contrary to the position taken here, that either party can ask the jury

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[12] The prosecutor argued (T. 650):

"Did you see, ladies and gentlemen, any competitors of Benjamin Schwartzberg come forward and put the lie to the witnesses of the Government?

"Did you hear one person? Any speck of testimony from a competitor of Mr. Schwartzberg's? Did you see, did you hear testimony from Martin Schwartzberg? He's a competitor. He's in the bialy business. Where was he? Where was he to testify and to put the lie to Mr. Steinberg and Mr. Reicher and Patti and Diane and Mr. Fisher? Think about that, ladies and gentlemen."

to draw such an inference and the jury can so find, if there is a logical basis for it in the record.[13]

In summary, defendant's complaints concerning the government's final argument are insubstantial. He places undue emphasis on the impact of several passing statements in a lengthy and reasoned summation (T. 632–661). This is particularly so in light of the fact that the trial judge made plain to the jury that it was "the sole deciders of the facts" (T. 661) and that "what the attorneys say is not evidence" (T. 598).

B. None of the other alleged instances of prosecutorial misconduct warrant reversal

Defendant contends that the government adduced an excessive amount of testimony relating to the state of mind of the victims. However, proof of the state of mind of the victims is essential to a successful prosecution for extortion. *United States* v. *Kennedy,* 291 F. 2d 457, 458 (2nd Cir., 1961); *Tropiano, supra,* 418 F. 2d at 1081. In the instant case, where the question of the defendant's reputation as it related to the victim's state of mind was vigorously disputed, a fair reading of the trial transcripts reveals that there was no abuse of the court's discretion in this area. See *United States* v. *Ravich,* 421 F. 2d 1196, 1204 (2nd Cir., 1970); *United States* v. *Montalvo,* 271 F. 2d 922, 927 (2nd Cir., 1959).

Defendant's final contention is that many of the prosecutor's "questions contained improper innuendos

[13] It should be noted that defendant also asked the jury to draw adverse inferences from the government's failure to call witnesses (T. 613–614, 625–626).

or assertions of fact" (Def. br. 13). According to defendant the most prejudicial of these questions was asked of a defense witness named Gadman. On direct examination he was asked "Did you ever hear him (the defendant) referred to as vicious, dangerous 'Benny the Bomber' or anything like that?" The witness indicated that he had not. On cross examination the following colloquy occurred (T. 553–554):

> You testified, Mr. Gadman—G-A-D-M-A-N?
>
> A. Gadman.
>
> Q. [Continuing]. That you never heard about the defendant having a dangerous, vicious reputation; is that correct?
>
> A. That is correct.
>
> Q. Would you change your mind if you heard that he spent one year in jail?
>
> Mr. KESTNEBAUM. I object to this, your Honor.
>
> Mr. SHANLEY. The defendant opened the door as to the reputation.

Whereupon the jury was excused and the court had Mr. Gadman's direct testimony read back. The court then concluded that the defendant had not made Gadman a character witness[14] and therefore the question

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[14] A strong argument can be made that the court's conclusion (that Gadman was not a character witness) was incorrect. The defendant argued that Gadman could be asked whether he had heard the defendant referred to as vicious etc. as relevant to whether the victims of the extortion plan were aware of this facet of defendant's personality. However, this ignores the fact that it was the subjective belief of the victims, not the objective question "was the defendant vicious", which was relevant to this issue and to which the court properly limited the prosecution. Thus when the defendant offered testimony that others (who were not victims of the

(Footnote continued)

could not be asked. Accordingly he instructed the jury to disregard the question (T. 564).

Defendant concludes that this instance necessitates reversal.[15] However, "not every admission of inadmissible hearsay or other evidence can be considered to be reversible error, unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in" *Frazier* v. *Cupp,* 394 U.S. 731, 735 (1969). Generally, the subsequent striking of such a question, when accompanied by a clear and positive instruction to disregard it, is sufficient to cure the error. See *United States* v. *Wells,* 431 F. 2d 432, 435 (6th Cir., 1970), certiorari denied, 400 U.S. 967. Although the court decided that Gadman did not testify as to reputation, it was a close question and in view of the instruction, the fact that no specific crime was mentioned, the conditional nature of the question, and the fact that defendant's credibility was not a factor in the defense case, the error was harmless.

(Continued)
extortion) had not heard of the defendants bad reputation, he was not offering evidence relevant to the victims subjective state of mind. Rather he was offering evidence as to the defendant's good reputation and the prosecutor's question was thus proper cross examination on this issue.

[15] *United States* v. *Broadway,* 477 F. 2d 991 (5th Cir., 1973), upon which defendant relies, is inapposite. It stands generally for the proposition that evidence of other related offenses cannot be admitted to shore up a weak case, a proposition with which we have no quarrel.

CONCLUSION

For the foregoing reasons, it is therefore respectfully submitted that the judgment of the district court should be affirmed.

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.
RICHARD L. SHANLEY,
Special Attorney,
Department of Justice.
ROBERT L. KEUCH,
TERENCE M. BROWN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Brief for Appellee, United States of America, were mailed this day to counsel for appellant, Michael P. Stokamer, 401 Broadway, New York, New York 10013.

Dated: 7/31/74 Terence M. Brown

TERENCE M. BROWN,
Attorney.

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